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Restrictive Business Practices
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CONSULTATIONS ON RESTRICTIVE BUSINESS PRACTICES

Directory of Restrictive Business Practices Control Authorities

Prepared by the UNCTAD secretariat

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INTRODUCTION

1. At its twelfth session, the Intergovernmental Group of Experts on Restrictive Business Practices agreed that:

"1. The checklists contained in TD/B/RBP/78/Rev.2 should be finalized by the secretariat, taking into account the comments made at the current session of the Group and any comments received from member States before 31 January 1994;

2. An updated directory on competition authorities should be circulated well in advance of the thirteenth session of the Intergovernmental Group of Experts;"

(Agreed Conclusions B.1 and 2 in annex I to the report of the Intergovernmental Group of Experts on Restrictive Business Practices on its twelfth session (TD/B/40(2)/2-TD/B/RBP/98)).

2. This document therefore contains an updated Directory of Competition Authorities to facilitate contacts between officials responsible for the control of restrictive business practices in the performance of their duties.

3. In case national Competition Authorities should wish to request information or initiate consultations with other national Competition Authorities, the checklists for requests for information and consultations, as finalized by the Group of Experts, are reproduced for reference in annex I to this document. It should be noted, however, that States are in no way bound to use such checklists, nor to complete every section indicated therein. In many cases, a telephone call or fax, or a personal contact, should be sufficient and just as effective in obtaining the information or consultation required.

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Written information about the anti-trust enforcement activities of the various State Attorneys General can be obtained either from the State Attorney-General in question or from the National Association of Attorneys General (NAAG), 444 North Capital Street, N.W., Washington, DC 20001, United States of America NAAG's telephone number is (202) 628-0435.

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Annex I

CHECK-LISTS FOR REQUESTS FOR INFORMATION AND CONSULTATIONS

1. As indicated in the introduction, the attached check-lists for requests for information and for consultations are simply check-lists of points States might wish to use in their requests in order to facilitate exchanges of information and consultation procedures as provided for in paragraph F.4 of the Set of Principles and Rules. States are in no way bound to use such lists, nor to complete every section indicated below. In many cases, a single telephone call or fax should be sufficient and just as effective in obtaining the information or consultation required. It should be noted, however, that the need for confidentiality may frequently prevent or restrict disclosures by competition agencies of much of the information they collect.

Background

2. The Set of Multilaterally Agreed Equitable Principles and Rules has emphasized the importance of the exchange of information, as demonstrated by its provisions dealing with information collection and dissemination. 1/ The importance of information in the area of restrictive business practices was further recognized by UNCTAD VII which, in its Final Act, 2/ recommended that UNCTAD's work in restrictive business practices "should continue and be strengthened, particularly with a view to ensuring transparency". Again, in the Cartagena Commitment, UNCTAD VIII agreed, inter alia, that efforts should be made by national Governments or regional authorities to implement fully the Set and to develop cooperation between national competition authorities, including competent authorities of regional groupings. 3/ This was further reflected in the resolution adopted by the Second United Nations Conference to Review all Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (Geneva, 26 November-7 December 1990). 4/ In paragraph 5 of that resolution, the Second Review Conference considered "that it would be helpful for States requesting information to have guidance" and requested the Secretary-General of UNCTAD: "to prepare an indicative check-list of items which may include, inter alia:

(a) A description of the restrictive business case in question;

(b) The enterprises involved;

(c) The legal basis for instituting proceedings;

(d) The reasons for requesting the information;

(e) The specific information sought;

(f) The intended use of the information."

3. In order to improve the implementation of the Set with regard to consultations, the Second Review Conference also requested the UNCTAD secretariat "to prepare a check-list of possible steps which countries may wish to follow in the preparation of a case, and in their request for

consultation. Such a check-list could include, inter alia, explaining the reasons for the request for consultations, and indicating the specific details of the behaviour or activity about which the consultation is requested" (para. 7 of the resolution).

Commentary to the check-list for requests of information

4. In order to ease the flow of information on restrictive business practices between States, the check-list must be clear and precise so as to facilitate the formulation of requests in terms that are as specific as possible and to reduce any risk of misunderstanding between the requesting and the addressed States. To this end, it would seem advisable that the list follow the structure of the Set of Multilaterally Agreed Equitable Principles and Rules and use its terminology, since this text has been agreed multilaterally and adopted as a United Nations instrument. Furthermore, the check-list should be sufficiently detailed so as to reduce the risk that aspects possibly important for the addressed State are not inadvertently omitted in the request. Comprehensiveness implies, of course, that not all items in the check-list are necessarily relevant to each particular case.

5. Conversely, the check-list should not be interpreted as being all inclusive in the sense that no items other than those mentioned may be addressed in a request. When using the check-list, requesting States should also provide any additional information about the case, the reasons for the request, the intended use of the information sought, or any other relevant aspect which they feel might facilitate understanding of, and compliance with, the request. They should also bear in mind that reasons of confidentiality, and legislation to this effect, may prevent or restrict the disclosure by the addressed competition authorities of part of the information they collect.

6. In the check-list which follows, restrictive business practices are simply enumerated. Stating that a request for information concerns, for example, a price-fixing case, in the sense of A.1 (a) (aa), below would not suffice. The case would have to be described in as much detail as necessary for an understanding of its competitive implications. Thus, for instance, time, duration, place, form of agreement or arrangement, whether horizontal or vertical, etc. would have to be described in detail. The same applies to the other restrictive business practices mentioned under A.1 below.

7. The following check-list is given in a tabulated form for ease of reference, and contains cross references to corresponding parts of the Set of Principles and Rules.

CHECK-LIST FOR REQUESTS FOR INFORMATION

(A) Description of the case

1. Restrictive business practice

(a) Agreement or arrangement (the Set, section D, para. 3)

(aa) Price fixing [Set D.3 (a)]

(bb) Collusive tendering [Set D.3 (b)]

(cc) Market or customer allocation [Set D.3 (c)]

(dd) Quota allocation as to sales and production [Set D.3 (d)]

(ee) Collective action to enforce arrangements [Set D.3 (e)]

(ff) Concerted refusal of supplies to potential importers [Set D.3 (f)]

(gg) Collective denial of access to an arrangement, or association, which is crucial to competition [Set D.3 (g)]

(b) Abuse or acquisition and abuse of a dominant position (Set D.4)

(aa) Predatory behaviour toward competitors [Set D.4 (a)]

(bb) Discriminatory behaviour [Set D.4 (b)]

(cc) Mergers, take-overs, joint ventures or other acquisitions [Set D.4 (c)]

(dd) Fixing the prices at which goods exported can be resold in importing countries [Set D.4 (d)]

(ee) Restrictions on the importation of goods in conjunction with trade marks [Set D.4 (e)]

(ff) Unjustified [Set D.4 (f)]

(i) Partial or complete refusal to deal [Set D.4 (f) (i)]

(ii) Distribution or manufacturing restrictions in conjunction with supply [Set D.4 (f) (ii)]

(iii) Resale or export restrictions [Set D.4 (f) (iii)]

(iv) Tying [Set D.4 (f) (iv)]

2. Enterprises involved

(a) Name, legal form;

(b) Location;

(c) Business activities.

3. Legal basis for instituting proceedings

(a) Applicable substantive rules (explanatory comment as far as necessary);

(b) Applicable rules of procedure (explanatory comment as far as necessary.

(B) Request for information

1. Description of the information sought

(a) Specific facts about which information is sought;

(b) Type of information sought (oral, written, other).

2. Reasons for the request

(a) Relevance of the information sought under the restrictive business practices law of the requesting State;

(b) Other measures, if any, previously or simultaneously taken to obtain the information sought;

(c) Reasons for assuming that the requested information may be available in the addressed State.

3. Intended use of the information sought

(a) Rules of procedure applicable to the use of the requested information;

(b) Specific use intended in the case;

(c) Confidentiality and secrecy laws, and other legal restraints relevant to the use of the requested information in the requesting State. How far could confidentiality be assured if required by the addressed State?

Commentary to the check-lists for information

8. With regard to consultations, the Set stipulates in Section F.4 the following:

"(a) Where a State, particularly of a developing country, believes that a consultation with another State or States is appropriate in regard to an issue concerning control of restrictive business practices, it may request a consultation with those States with a view to finding a mutually acceptable solution. When a consultation is to be held, the States involved may request the Secretary-General of UNCTAD to provide mutually agreed conference facilities for such a consultation;

"(b) States should accord full consideration to requests for consultations and, upon agreement as to the subject of and the procedures for such a consultation, the consultation should take place at an appropriate time;

"(c) If the States involved so agree, a joint report on the consultations and their results should be prepared by the States involved and, if they so wish, with the assistance of the UNCTAD secretariat, and be made available to the Secretary-General of UNCTAD for inclusion in the annual report on restrictive business practices."

9. As provided in section F, paragraph 4 of the Set, consultations may be requested "in regard to an issue concerning control of restricted business practices". Such an issue might be a specific case involving private restraints to competition as included in part A of the indicative check-list for requests for information given below.

10. With respect to the description of the case, much of part A - Description of the case - as contained in the indicative check-list for requests for information above is used in the proposed check-list for request for consultations given below.

11. Although requests for consultations in individual cases may be those most likely to play a role in practice, section F, paragraph 4, of the Set clearly covers other situations as well. An "issue concerning the control of restrictive business practices" may also arise in the context of government policies of another State in regard to effects of restrictive business practices at the international level, for instance in conjunction with effects on competition abroad of new legislation, of new enforcement policies, of new enforcement guidelines, or of new trends in court practice which might affect anti-trust practice.

12. Governments may even find "an issue concerning the control of restrictive business practices" meriting consultation with other States if they contemplate changes in their own legislation or enforcement policies, or if there are relevant changes in the practice of their own courts. If such changes can have an impact on international trade or otherwise touch upon substantial interests of other States, the State concerned may deem appropriate to request consultations on this "issue concerning the control of restrictive business practices" in order to find mutually acceptable solutions at an earlier stage when this appears to be easier than after negative effects on other States have already materialized. This type of request for consultation is elaborated in part B of the check-list for consultations given below.

13. Addressing in the check-list not only issues within the sphere of other States, but also those in a State's own sphere, would thus have the advantage of encouraging countries with broader experience in the enforcement of competition laws and policies, especially developed countries, to take the initiative in avoiding or reducing such conflicts. This aim would also be in line with the general policy objective of the Set to improve international cooperation in the control of restrictive business practices and to prevent or minimize conflict situations in this field.

14. With respect to part C of the check-list for requests for consultations, experience has shown in consultations undertaken in international forums, that complex, formalized procedures tend to be counter-productive, preference being given to informal ones. There should be full freedom for the parties in respect of the subject of consultations, their objective and modalities.

15. In the check-list which follows, restrictive business practices are simply enumerated. The reservations discussed in paragraph 6 apply in this case also.

16. The following check-list is given in a tabulated form for ease of reference, and contains a cross-reference to corresponding parts of the Set of Principles and Rules.

CHECK-LIST FOR REQUESTS FOR CONSULTATIONS

(A) Request for consultations in a specific case

1. Description of the case

(a) Restrictive business practices

(aa) Agreement or arrangement (the Set, section D, para. 3)

(i) Price fixing [Set D.3 (a)]

(ii) Collusive tendering [Set D.3 (b)]

(iii) Market or customer allocation [Set D.3 (c)]

(iv) Quota allocation as to sales and production [Set D.3 (d)]

(v) Collective action to enforce arrangements [Set D.3 (e)]

(vi) Concerted refusal of supplies to potential importers [Set D.3 (f)]

(vii) Collective denial of access to an arrangement, or association, which is crucial to competition [Set D.3 (g)]

(bb) Abuse or acquisition and abuse of a dominant position (Set D.4)

(i) Predatory behaviour toward competitors [Set D.4 (a)]

(ii) Discriminatory behaviour [Set D.4 (b)]

(iii) Mergers, take-overs, joint ventures or other acquisitions [Set D.4 (c)]

(iv) Fixing the prices at which goods exported can be resold in importing countries [Set D.4 (d)]

(v) Restrictions on the importation of goods in conjunction with trade marks [Set D.4 (e)]

(vi) Unjustified [Set D.4 (f)]

- Partial or complete refusal to deal [Set D.4 (f) (i)]
- Distribution or manufacturing restrictions in conjunction with supply [Set D.4 (f) (ii)]
- Resale or export restrictions [Set D.4 (f) (iii)]
- Tying [Set D.4 (f) (iv)]

(b) Enterprises involved

(aa) Name, legal form;

(bb) Location;

(cc) Business activities.

(c) Legal basis for instituting proceedings

(aa) Applicable substantive rules (explanatory comment as far as necessary);

(bb) Applicable rules of procedure (explanatory comment as far as necessary).

2. Reasons for the request for consultations

(a) Wish to consult about specific restrictive business practices of enterprises located in the addressed State, affecting the requesting State.

(b) Wish to consult about information or evidence needed by the requesting State in a specific case.

(c) Wish to consult about procedural difficulties of the requesting State in conjunction with the service of documents or enforcement measures in a specific case.

(d) Wish to consult about the coordination of enforcement measures in a specific international case, with the aim of finding mutually acceptable enforcement options.

(B) Requests for consultations in other matters

1. Description of the issues in question

(a) Competition legislation or legislation with competitive implications which may have an impact on international trade.

(b) Administrative matters in the field of competition or fields with competitive implications, which may have an impact on international trade.

(c) Court practice in the field of competition or fields with competitive implications which may have an impact on international trade.

2. Reasons for the request for consultations

(a) Legislation

(aa) Wish to consult about adopted or contemplated legislation of the requesting State that does or may have an impact on international trade.

(bb) Wish to consult about adopted or contemplated legislation of the addressed State that does or may have an impact on international trade.

(b) Administration

(aa) Wish to consult about adopted or contemplated administrative measures of the requesting State that do or may have an impact on international trade.

(bb) Wish to consult about adopted or contemplated administrative measures of the addressed State that do or may affect important interests of the requesting State.

(c) Court practice

(aa) Wish to consult about court practice in the requesting State that does or may have an impact on international trade.

(bb) Wish to consult about court practice in the addressed State that does or may affect important interests of the requesting State.

(C) Procedure for consultations

Full freedom is left to the parties as regards the subject of consultations, their objectives, modalities, the participation of third parties, eventual involvement of the Secretary-General of UNCTAD, etc.

However, the items on which agreement should be reached before entering into consultations might preferably include the question of the language to be used, how the eventual costs of participating in consultations are to be allocated between the requesting State and the addressed State. Also, with respect to confidentiality of information, while such concerns may frequently prevent disclosure of information, agreement might be reached as to the confidentiality required from the State receiving confidential information.

(C) The need for information and consultations

17. As domestic markets are liberated from State regulation and control, the distinction between national and international markets tends to be blurred as capital, manpower goods and services cross frontiers with increasing freedom. The role of the private enterprises in production and trade is growing fast - but so is competition among enterprises. Competition without any appropriate rules of the game leads in time invariably to concentration of market power and restrictive business practices. It is essential to enforce strong competition policy in order to promote and enhance competition at all levels, domestic and international. This is clearly one of the reasons why a growing number of countries, especially those that have introduced liberalization reforms, are adopting restrictive business practices control legislation. Without such legislation to enhance competition, reduced governmental barriers to trade would soon be replaced by "private" enterprise-level barriers and distortions of all sorts.

18. While markets in many sectors lead towards globalization, national jurisdictions are in many cases limited at the national borders. This means that many States which adopt and enforce restrictive business practices control and legislation will encounter the limits of their control and will have to resort to bilateral and multilateral efforts to resolve issues in the area of restrictive business practices.

19. As recognized by UNCTAD VII, in addition to adopting national restrictive business practices legislation, and provision of appropriate technical assistance therefor, the multilateral issues with respect to restrictive business practices which necessitate immediate action are transparency (i.e. exchange of information) and definition of practicable consultation procedures.

20. The growing number of countries adopting or planning to adopt competition legislation augurs well for the future of multilateral efforts in this area. At present, however, implementation of the Set remains in its infancy with respect to these issues, especially regarding consultations.

21. The check-lists for information and for consultations should be a practical vehicle for States wishing to approach other States concerning issues in the area of restrictive business practices. In this respect, it should be recalled that in line with provision F.4 (a) of the Set, the States involved may request the Secretary-General of UNCTAD to provide mutually agreed conference facilities for consultation.

Notes

1/ See, for example, in the Set (TD/RBP/CONF.10/Rev.1), section C, provision 3; section E, provisions 5, 6, 7, 8, 9; section F, provisions 2 and 3.

2/ Final Act of UNCTAD VII (Geneva, 9 July-3 August 1987).

3/ A New Partnership for Development: the Cartagena Commitment, paragraph 147.

4/ See annex to the Report of the Second United Nations Conference to Review all Aspects of the Set (TD/RBP/CONF.3/9).